IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 27, 2006

STATE OF TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES v. C.M.B.

Appeal from the Juvenile Court for Knox County
No. 61828 Timothy Irwin, Judge
Filed December 13, 2006

No. E2006-00841-COA-R3-PT

The trial court terminated the parental rights of C.M.B. ("Mother") with respect to her five minor children: D.N.H. (DOB: December 31, 1994), A.T.B. (DOB: March 7, 1997), D.D.B. (DOB: February 2, 1998), D.M.B. (DOB: January 31, 2000), and S.M.B. (DOB: February 21, 2002) (collectively "the children"). The court did so after finding, by clear and convincing evidence, that grounds for termination existed and that termination was in the best interest of the children. Mother appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Ben H. Houston, II, Knoxville, Tennessee, for the appellant, C.M.B.

Michael E. Moore, Acting Attorney General and Reporter, and Amy T. McConnell, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee Department of Children's Services.

B. Gail Howell, Maryville, Tennessee, Guardian Ad Litem for D.N.H., A.T.B., D.D.B., D.M.B., and S.M.B.

OPINION

I.

On June 25, 2004, the Tennessee Department of Children's Services ("DCS") filed a petition for temporary custody of the children, alleging that Mother and J.A.Y., the father of the two youngest children, had a history of domestic violence in the presence of the children. The petition details an incident in February, 2004, dealing with a domestic violence event involving Mother and J.A.Y. When the police responded to a call, they found crack cocaine within the reach of the children. On that occasion, DCS, instead of removing the children, assigned Mother a case management agent, who referred her to resources equipped to help her with domestic violence and substance abuse issues. The petition further states that the police were summoned again on June 24, 2004, at which time Mother was the victim of domestic violence at the hands of J.A.Y. at a time when some of the children were present. On that date, the children were removed from the custody of Mother on an emergency basis. At a hearing on September 20, 2004, the trial court adjudicated the children to be dependent and neglected based upon clear and convincing proof. DCS was awarded temporary custody of the children.

In July, 2004, DCS prepared a permanency plan for each of the five children. The plans were identical. The goal of the plans was Mother's reunification with the children. Mother was required by the plans to accomplish the following by January 12, 2005: (1) attend and complete counseling to address issues of domestic violence, anger management, and loss of her children; (2) complete an alcohol and drug assessment and remain drug-free; (3) resolve all pending criminal charges; (4) attend necessary court dates regarding criminal charges; (5) follow the rules of her probation; (6) follow all court orders; (7) attend scheduled visitation with her children; (8) pay child support; and (9) meet the basic requirements of a parent having a child in DCS custody, including to (a) cooperate with DCS and all service providers, (b) contact a DCS worker at least twice a month, (c) inform DCS of any changes in her circumstances within five days, and (d) attend meetings, staffings, and court hearings related to her children. On August 11, 2004, the trial court found these requirements to be reasonable and ratified the permanency plans.

On July 6, 2005, DCS staffed its second set of permanency plans[1] in this case. The goal of the plans had changed from a single goal to dual goals: adoption and reunification. In order to be reunified with her children, Mother was required to accomplish the following by January 6, 2006: (1) attend and complete counseling to address issues of domestic violence, anger management, and loss of her children, and provide verification of such completion to DCS; (2) continue to follow all recommendations from her alcohol and drug assessment, remain drug-free, and provide documentation of random drug screens to DCS; (3) complete a diagnostic interview to determine the extent of any mental health issues, follow all recommendations from this interview, and provide documentation to DCS; (4) continue to follow and abide by all rules of her probation; (5) follow all court orders; (6) obtain and maintain a legal source of income and stable housing; (7) obtain and maintain access to reliable and legal transportation; (8) pay child support; and (9) meet the basic

[1]Once again there was a separate parenting plan for each child; however, as with the original plans, these plans contained identical requirements.

requirements of a parent having a child in DCS custody, including to (a) cooperate with DCS and all service providers, (b) contact a DCS worker at least twice a month, (c) inform DCS of any changes in her circumstances within five days, and (d) attend meetings, staffings, and court hearings related to her children. The trial court ratified the second set of permanency plans on August 24, 2005.

On September 14, 2005, DCS filed a petition to terminate the parental rights of Mother, on multiple grounds: abandonment by failure to provide a suitable home; abandonment by failure to support; persistence of conditions; and substantial non-compliance with the permanency plans. This petition also included allegations relating to the February, 2004, domestic violence call when the police found cocaine within the reach of the children. Following a hearing on February 7, 2006, the trial court terminated the parental rights of Mother, finding clear and convincing evidence to support the following grounds for termination: persistent unremedied conditions and substantial non-compliance with the permanency plans. The trial court also found by clear and convincing evidence that termination was in the best interest of the children.

In its final judgment, entered on March 8, 2006, the trial court found in pertinent part as follows:

> These children were removed from their mother's care due to a history of domestic violence and substance abuse. For several months prior to their removal [DCS] had attempted to get [Mother] into substance abuse treatment but she failed to cooperate with those efforts. She has incurred criminal charges related to her drug use. She admitted smoking marijuana and cocaine was found in the house within reach of the children. During this same time period [Mother] was in an abusive relationship with [J.A.Y.], the father of her youngest children. She tried to cover for him, lying to [the DCS] case manager about his presence in her home. The Court notes that portions of her testimony today were untruthful or shaky at best.
>
> The first permanency plan developed for [Mother] on July 12, 2004, required (among other things) that she (a) complete counseling to address issues of domestic violence, anger management, and the loss of her children; (b) complete substance abuse treatment; and (c) comply with the rules of her probation. That plan was to have been completed within six (6) months. An updated plan was developed a year later. The second plan required (among other things) that she (a) complete the counseling previously required; (b) complete substance abuse treatment; (c) obtain a psychological assessment and follow recommendations; and (d) obtain stable housing (a requirement added because [Mother] had lost her home in the interim). The second plan added the concurrent goal of adoption due to the length of time the

children had been in foster care and [Mother's] lack of progress. It was to have been completed by January 6, 2006.

It is clear that [Mother] has made only minimal progress. She has maintained employment but there is no evidence that she has paid any child support. Just the day before this hearing she signed a lease for a two-bedroom apartment. Prior to that she was living in a hotel room with rent paid, at least for a time, by [J.A.Y.]. As the Guardian ad Litem noted, this timing may show desperation but it does not show compliance. [Mother] attempted to participate in counseling for a couple months at two separate facilities. According to her testimony, she attended Center Pointe but was discharged and never went back. She worked with Cathy Duncan at Child & Family for a couple months but not recently. She has visited faithfully. It is obvious that she loves her children, in her own way, but there is more to being a mother than loving. It is [Mother's] inactivity and her non-compliance that produces the results here.

The Court cannot find one area of risk where there has been improvement; the risk to these children in their mother's care remains exactly the same now as it was the day they were removed. When asked why her children are in foster care, [Mother] stated that it was because "somebody called on me". When asked what she needed to do to regain custody, she stated that she needed to keep a job and "stay focused", meaning "go to classes." She has not taken any responsibility for the substance abuse and domestic violence that placed her children at risk and led to their removal. She testified that she did not really need substance abuse treatment, counseling or anger management classes and, to the extent that she participated, was doing so only because they were on her plan. She stated that she does not have a drug problem and that she does not see it as a problem, yet has not stopped smoking marijuana. She failed fifteen of the sixteen weekly drug screens administered by [DCS] since September 2005 and was jailed during the last year for violating her probation by failing a drug screen. She failed to complete either substance abuse treatment or individual counseling/domestic violence treatment and has not participated in any treatment for several months despite knowing that this hearing was set. Nevertheless, she admitted being suspended from GED classes due to her anger, wanting to "do something" to the person who suspended her, and "cutting" [J.A.Y.] during an argument.

Beginning in the months before these children were removed [DCS] visited [Mother] frequently, offered services, and pointed her in the right direction. It is obvious that she was aware of services available to her and took advantage of some of them at least on a temporary basis. We fight so hard to get people into treatment, it is really disappointing when they actually do get in and then don't make it. [Mother] had several opportunities to participate in treatment but failed to take advantage of those opportunities. She was advised repeatedly that she needed to make significant progress within a year and that failure to do so could result in termination of her parental rights. Her case manager had those conversations with her and made sure that she knew how to access the treatment programs required of her. She attended Foster Care Review Board where her progress on the plan requirements was again reviewed. The Board reminded her that time was of the essence and asked if she needed any assistance; she acknowledged that she knew what she needed to do, understood the consequences of failing to comply, and did not need any other help.

Upon those facts, the Court finds that these children have been removed for a period of six (6) months; the conditions which led to their removal still persist; there is little likelihood that these conditions will be remedied at an early date so that these children can be returned to [Mother] in the near future; the continuation of the legal parent and child relationship greatly diminishes the children's chances of early integration into a stable and permanent home.

The Court further finds that the responsibilities set out in the permanency plans were directly and reasonably related to the conditions which necessitated foster care placement and that [Mother] has failed to comply in a substantial manner with those reasonable responsibilities.

[Mother] has not made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the children's best interest to be in her home despite reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible. She has shown neglect toward these children and has exposed them to an environment of domestic violence. The children now feel safe and a change of caretakers and physical environment is likely to have a detrimental effect on their emotional and psychological condition. [Mother] continues to engage in criminal activity through her continued substance abuse.

(Numbering in original omitted).

II.

The law is well established that "parents have a fundamental right to the care, custody, and control of their children." ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing ***Stanley v. Illinois***, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). This right, however, is not absolute and may be terminated if there is clear and convincing evidence justifying termination under the pertinent statute. ***Santosky v. Kramer***, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Clear and convincing evidence is evidence that "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." ***O'Daniel v. Messier***, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

III.

In cases involving the termination of parental rights, the objectives of our *de novo* review are somewhat different from our review of a typical bench trial. The difference is addressed in our case of ***In re M.J.B.***, in which we said the following:

> Because of the heightened burden of proof required by Tenn. Code Ann. § 36-1-113(c)(1), we must adapt Tenn. R. App. P. 13(d)'s customary standard of review for cases of this sort. First, we must review the trial court's specific findings of fact de novo in accordance with Tenn. R. App. P. 13(d). Thus, each of the trial court's specific factual findings will be presumed to be correct unless the evidence preponderates otherwise. Second, we must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements required to terminate a biological parent's parental rights.

140 S.W.3d 643, 654 (Tenn. Ct. App. 2004) (citations omitted). As can be seen from the above, our determination regarding the issue of whether "the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements required to terminate a biological parent's parental rights" is a question of law. Hence, with respect to this latter aspect of our review, we accord no presumption of correctness to the trial court's judgment. ***Southern Constructors v. Loudon County Bd. of Educ.***, 58 S.W.3d 706, 710 (Tenn. 2001).

IV.

T.C.A. § 36-1-113(g) lists the grounds upon which parental rights may be terminated, and "the existence of any one of the statutory bases will support a termination of parental rights." ***In re***

C.W.W., 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000). The issues raised in the pleadings, and the trial court's findings, implicate the following statutory provisions:

T.C.A. § 37-1-147 (2005)

> (a) The juvenile court shall be authorized to terminate the rights of a parent or guardian to a child upon the grounds and pursuant to the procedures set forth in title 36, chapter 1, part 1.
>
> * * *

T.C.A. § 36-1-113 (Supp. 2006)

> (a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, . . . by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.
>
> * * *
>
> (c) Termination of parental or guardianship rights must be based upon:
>
> (1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and
>
> (2) That termination of the parent's or guardian's rights is in the best interests of the child.
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> * * *
>
> (g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:
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> * * *
>
> (2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

(3) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

* * *

T.C.A. § 37-2-403 (2005)

(a)(1) Within thirty (30) days of the date of foster care placement, an agency shall prepare a plan for each child in its foster care. . . .

* * *

(2)(A) The permanency plan for any child in foster care shall include a statement of responsibilities between the parents, the agency and the caseworker of such agency. Such statements shall include the responsibilities of each party in specific terms and shall be reasonably related to the achievement of the goal specified [in the plan]. . . .

* * *

(C) Substantial noncompliance by the parent with the statement of responsibilities provides grounds for the termination of parental rights, notwithstanding other statutory provisions for termination of parental rights. . . .

V.

Mother appeals and raises three issues for our consideration:

1. Did the trial court err by relying on inadmissible hearsay evidence despite the objection of Mother's trial counsel?

2. Did the trial court err by terminating Mother's parental rights even though DCS failed to make reasonable efforts to reunify the children with Mother?

3. Did the trial court err when it found clear and convincing evidence that it was in the best interest of the children to terminate Mother's parental rights?

We will address each of these issues in turn.

VI.

Mother first contends that the trial court erred by relying on inadmissible hearsay evidence despite the objections of her trial counsel.

At the hearing, Ginger McBrayer, a DCS case manager assigned to this case, was asked to read into evidence the records kept by a previous DCS case management agent. Mother's trial counsel promptly objected:

> Mr. Anen [Mother's counsel]: Your Honor, I'm going to object. If there's a witness that is here, that could be here or should be here, we would like to have direct testimony from them rather than referring to something that I can't technically cross-examine.
>
> The Court: I'm going to overrule the objection on the business records exception. I'm sure that it would be great if we could have everyone that worked on this matter and maybe fill this room, but I'm going to allow her to proceed with this witness.

With the trial court's permission, Ms. McBrayer read several pages directly from the previous agent's records. Then, the trial court interrupted the testimony and the following exchange occurred:

> The Court: Stop just a second. Where is this person?
>
> Ms. Kovac [DCS counsel]: The person who is reporting this?
>
> The Court: Yes, the second person.
>
> Ms. Kovac: Our employee?

The Court: Yes. Does she still work for you?

Ms. Kovac: I don't believe so, Your Honor. It was the targeted case management agent.

The Court: How many more people are we going to hear from?

Ms. Kovac: This is it.

The Court: You know, the Defense makes a pretty good objection. I'm letting it come in under the records exception --

Ms. Kovac: And that's why we're reading it rather than --

The Court: I understand, and I'm also going to encourage you to bring witnesses when possible, and also if you can't bring witnesses, you need to be prepared to bring the custodian of the records, one or the other.

Ms. Kovac: This is the custodian of the records, Your Honor.

The Court: Are you the custodian of these records?

The Witness [Ms. McBrayer]: Yes.

The Court: All right. I just wanted to make sure we're clear on that because Mr. Anen had a good, valid objection. Otherwise we're on a higher standard on a termination proceeding than we are on custody.

Ms. Kovac: I understand, Your Honor.

The Court: I mean, I can let reliable hearsay in on a 72-hour hearing, but I can't here.

Ms. Kovac: Plus, Your Honor, all of these are recorded statements.

The Court: I understand that. Let's just make sure in the future that we always have either the custodian like we do here or the witnesses.

In her brief, Mother points out that, in order for these records to be admissible under the business records exception, DCS had to demonstrate that the records were made at or near the time of the incidents reported in the records, and that the records were created by someone with a business duty to record or transmit the records during the course of a regularly conducted business activity.

Mother argues that DCS failed to demonstrate either of these requirements and therefore the trial court erred by admitting these records into evidence through the testimony of another DCS case manager. Moreover, Mother maintains that this error was critical because the trial court relied upon inadmissible evidence from these records in determining that DCS had proven grounds for termination by clear and convincing evidence. Specifically, the trial court made a reference in its final judgment, as well as in its comments from the bench at the conclusion of the proof, that cocaine was found within the reach of the children. Mother argues that "[o]ther than the inadmissible hearsay introduced by [DCS] there is no evidence in the record to support this uncorroborated yet highly prejudicial allegation."

A hearsay statement is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Such a statement is not admissible unless it is shown to be admissible "as provided by the[] rules [of evidence] or otherwise by law." Tenn. R. Evid. 802. Tenn. R. Evid. 803(6) covers the hearsay exception for records of regularly conducted activity. This rule requires that the record be "made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the . . . report . . ., all as shown by the testimony of the custodian or other qualified witness. . . ." Tenn. R. Evid. 803(6).

The trial court correctly noted that the subject testimony fits the definition of hearsay. Tenn. R. Evid. 801. While the business records exception provided in Tenn. R. Evid. 803(6) may have been applicable under these circumstances, we find that DCS failed to lay a proper foundation for the admission of these records into evidence. The manner in which the witness was asked about these records and the exchange between DCS counsel and the trial court, as illustrated above, is simply insufficient.

While we find that the trial court erred by admitting the records under the business records exception of Tenn. R. Evid. 803(6), we do not conclude that such error is reversible. Tenn. R. App. P. 36(b) instructs that "[a] final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Considering this standard and viewing the record as a whole, we hold that the error was harmless because the trial court's reliance on the *allegation* that cocaine was found within the reach of the children did not more probably than not affect the outcome in this case. As detailed in its final judgment, the trial court, in terminating Mother's parental rights, relied upon many other facts – in addition to the cocaine incident. We hold that the improperly-admitted evidence pertaining to cocaine is not an error that probably affected the trial court's judgment or one that, if uncorrected, "would result in prejudice to the judicial process." Tenn. R. App. P. 36(b). This issue is found adverse to Mother.

VII.

Next, Mother argues that the trial court erred by terminating her parental rights because, according to her, DCS failed to make reasonable efforts to reunify her with the children. In discussing this issue, we note at the outset that Mother does not appear to be challenging the grounds for the termination of her parental rights, *i.e.*, persistent unremedied conditions and substantial non-compliance with the permanency plans. Nevertheless, in the interest of justice, we have reviewed the record pertaining to these unchallenged grounds for terminating Mother's parental rights. We conclude that the evidence does not preponderate against the trial court's findings of fact that support these grounds for termination. These findings, as a matter of law, demonstrate termination grounds clearly and convincingly.

In a parental termination case, the issue of reasonable efforts is addressed within the best interest framework of T.C.A. § 36-1-113(i). *See* ***In re A.W.***, 114 S.W.3d 541, 545 (Tenn. Ct. App. 2003). Subsection (2) of this statute provides as follows:

> In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:
>
> * * *
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible[.]

T.C.A. § 36-1-113(i)(2).

The evidence in the record is clear that DCS made reasonable efforts to assist Mother with domestic violence issues, substance abuse, anger management, and housing issues in order to facilitate the return of her children. Ms. McBrayer, the DCS case manager assigned to this case, provided Mother with a list of substance abuse treatment resources and personally discussed them with her. Ms. McBrayer also gave Mother bus passes because she did not have her own transportation. Mother was discharged from the Women's Intensive Outpatient Program at Center Point for failure to comply with treatment recommendations and failure to demonstrate improvement. At the Child and Family Tennessee Program, Mother stopped attending both individual therapy and drug treatment after she was incarcerated, and she also refused to take prescribed medication for depression. Ms. McBrayer repeatedly informed Mother that she must complete these programs and provide documentation of completion by a certain deadline in order to get custody of her children. Mother acknowledged that she knew she had to meet numerous requirements under the permanency plans in order to get her children back. Although Mother

attended some programs sporadically, she never completed the programs and never provided documentation of completion to DCS.

Ms. McBrayer also stated that she provided Mother with a community resources list and informed her about places where she could get housing. Ms. McBrayer testified that Mother acted like she did not want any help in finding housing and insisted that J.A.Y., her "babies' daddy," was paying for her to stay at a hotel. According to Ms. McBrayer, Mother was not cooperative in talking to her, explaining that Mother would often wear headphones during their meetings. In addition, Ms. McBrayer stated that Mother did not keep DCS informed of her whereabouts.

We note Mother's testimony that DCS made no efforts to find housing for her. According to Mother, upon asking Ms. McBrayer for help with housing, Ms. McBrayer said she would help find housing for her children but not for her. The trial court specifically found that Mother's testimony was not credible. The credibility of witnesses is a matter that is peculiarly within the province of the trial court, *see* ***Bowman v. Bowman***, 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991), and therefore determinations regarding witness credibility are entitled to great weight on appeal. *See, e.g.*, ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995). With respect to the issue of housing, Mother also testified that she signed a lease for a two bedroom apartment the day before the hearing in this matter. The trial court agreed with the guardian ad litem's observation that "this timing may show desperation but it does not show compliance."

Given this proof, we do not find that the evidence preponderates against the trial court's finding that DCS made reasonable efforts to reunify the children with Mother. As we have previously stated, "[t]he statute does not require a herculean effort on the part of DCS," but rather that DCS "make 'reasonable efforts.'" ***State Dep't of Children's Servs. v. Malone***, No. 03A01-9706-JV-00224, 1998 WL 46461, at *2 (Tenn. Ct. App. E.S., filed February 5, 1998).

In support of her position on the issue of reasonable efforts, Mother cites the case of ***In re J.L.E.***, No. M2004-02133-COA-R3-PT, 2005 WL 1541862 (Tenn. Ct. App. M.S., filed June 30, 2005). Mother's brief makes the following argument in reference to this case:

> Reasonable efforts must "entail more than simply providing parents with a list of service providers and sending them on their way." [DCS] "employees must use their superior insight and training to assist parents with the problems the Department has identified in the Permanency Plan, whether the parents ask for assistance or not." Furthermore, this Court has strongly cautioned [DCS] against filing a petition to terminate parental rights well in advance of the expected achievement date set forth in a permanency plan in the absence of extraordinary circumstances. Such "concerns are based on the fundamental unfairness inherent in providing the parent of notice of one set of expectations and acting inconsistently with that notice."

(Citations from ***In re J.L.E.*** omitted). While the general principles noted by Mother, as reflected in ***In re J.L.E.***, still hold true, it is important to point out that the Court of Appeals in ***In re J.L.E.*** specifically stated that the efforts of DCS "under some situations . . . may be perfectly reasonable." ***Id.***, at *14. In that litigation, the Court was faced with a mildly mentally retarded mother who had comprehension difficulties. In the instant case, which is easily distinguishable, there is no evidence that Mother had a low IQ and could not comprehend what she needed to accomplish in order to ensure the return of her children. In fact, as noted previously, Mother admitted in her testimony that she understood that she must meet numerous requirements under the permanency plans in order to get her children back. Moreover, although DCS did file for termination approximately four months before the expected date of completion of the second set of permanency plans, it is apparent that Mother repeatedly failed to comply with numerous plan requirements for over a year before the petition was filed and that there was nothing that stood in her way of working towards meeting the requirements even after the petition was filed in an attempt to demonstrate why the termination hearing should be postponed.

We hold that Mother's second issue is without merit.

VIII.

Finally, Mother contends that the trial court erred by finding clear and convincing evidence that it was in the best interest of the minor children to terminate her parental rights.

The factors a trial court must consider when deciding whether the termination of parental rights is in the best interest of a child are set forth in T.C.A. § 36-1-113(i):

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

> (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
>
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
>
> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
>
> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

This list is "not exhaustive," and there is no requirement that every factor must appear "before a court can find that termination is in a child's best interest." ***Dep't of Children's Servs. v. T.S.W.***, No. M2001-01735-COA-R3-CV, 2002 WL 970434, at *3 (Tenn. Ct. App. M.S., filed May 10, 2002).

In its final judgment, the trial court stated that termination of Mother's parental rights was in the best interest of her five children. In considering the best interest of the children in this case, we, of course, rely upon the proof set forth in detail earlier in this opinion. To summarize, Mother repeatedly failed to meet the permanency plans edicts that she successfully address domestic violence issues, substance abuse, anger management, and housing issues.

In addition, although Mother testified that she had been employed at fast food restaurants almost the entire time her children were in DCS custody, there is no evidence that she paid child support as required under her plans. *See* T.C.A. § 36-1-113(i)(9). Most significantly, Mother was unable to remain drug-free throughout the pendency of this matter. According to Ms. McBrayer, Mother failed 15 of the 16 weekly drug screens that were administered to her. Mother tested positive for marijuana use on all of those occasions, and she also tested positive for methamphetamine use on the test given just over a month before the hearing in this matter. The drug screen failures resulted in Mother violating her probation and having to serve jail time. We further note that Mother denies having a drug problem despite the overwhelming proof that she does have one. The evidence is clear that the children would not be in a healthy and safe physical environment if they returned to Mother's custody because she continues to engage in criminal activity through the use of illegal

substances such that she may be consistently unable to care for the children in a safe and stable manner. *See* T.C.A. § 36-1-113(i)(7).

All five of Mother's children have been in the same foster care home since their initial removal in June, 2004. In his role as therapeutic foster care specialist, Jason Rudd visited the children weekly and notes that the children have bonded well with their foster parents, who wish to adopt all of the children. Mr. Rudd also stated that the children's behavior problems have resolved and that they are doing well in school. We find that a change in caretakers at this time, *i.e.*, returning the children to the care of Mother, would likely have a profoundly negative emotional and psychological impact on the children. *See* T.C.A. § 36-1-113(i)(5).

Finally, as did the trial court, we note that Mother faithfully visited her children during the entire time they were in DCS custody, except for periods when she was incarcerated. *See* T.C.A. § 36-1-113(i)(3). Moreover, it is clear that Mother loves her children, and Mr. Rudd also noted a strong bond between Mother and her children. *See* T.C.A. § 36-1-113(i)(4). However, in assessing the children's best interest, we cannot ignore evidence from Mr. Rudd that a typical visit involved Mother giving the children snacks, the children then wandering off, and Mother "sometimes will follow, sometimes will sit in the lobby, and sometimes she's on the phone." Mr. Rudd also noted that the children are often more interested in playing with their foster father, who has to prompt the children to spend time with Mother. Ms. McBrayer also confirmed that the children would be doing their own things during visits and that Mother would not really engage them. We agree with the trial court's comment that "there is more to being a mother than loving."

We conclude that the evidence does not preponderate against the trial court's factual findings supporting its conclusion that the termination of the parental rights of Mother is in the best interest of the children. Furthermore, we hold, as a matter of law, that those findings support the trial court's ultimate determination clearly and convincingly.

IX.

The judgment of the trial court is affirmed and this matter is remanded to that court for enforcement of its judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed against the appellant, C.M.B.

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CHARLES D. SUSANO, JR., JUDGE